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Mandatory Motherhood and Frustrated Fatherhood: The Supreme Court's Preservation of Gender Discrimination in American Citizenship Law

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Mandatory Motherhood and Frustrated Fatherhood: The Supreme Court's Preservation of Gender Discrimination in American Citizenship Law

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Motherhood, Fatherhood, Gender Discrimination, Citizenship Law, Supreme Court, Equal Protection

COMMENTS

MANDATORY MOTHERHOOD AND FRUSTRATED FATHERHOOD: THE SUPREME COURT'S PRESERVATION OF GENDER DISCRIMINATION IN AMERICAN CITIZENSHIP LAW

ERIN CHLOPAK*

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INTRODUCTION

On June 11, 2001, the United States Supreme Court issued a controversial opinion in *Nguyen v. Immigration and Naturalization Service*,¹ holding that gender-based disparities in the federal law governing parental transmission of citizenship to children born outside the United States² do not violate constitutional guarantees of equal protection.³ Specifically, the Court ruled that the additional

1. 533 U.S. 53, 121 S. Ct. 2053 (2001).

2. See 8 U.S.C. § 1409 (1994) (legislating distinct conditions under which unwed American mothers and unwed American fathers may transmit their U.S. citizenship to children born overseas).

3. See U.S. CONST. amend. V (providing that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law"). It is well settled that the due process clause of the Fifth Amendment to the United States Constitution contains an equal protection component, analogous to the explicit equal protection guarantees in the Fourteenth Amendment. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (explaining that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (acknowledging "an equal protection component" in the Due Process Clause of the Fifth Amendment); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 636 (1975) (holding that gender-based distinctions in a federal social security statute violated the "right to equal protection secured by the Due Process Clause of the Fifth Amendment" and specifying that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment"); see also Respondent's Brief at 9, *Nguyen* (No. 99-2071) (explaining that the issue before the Supreme Court in *Nguyen* was

statutory obligations imposed on unwed fathers seeking to transmit their citizenship to a foreign-born child,⁴ in contrast to the minimal obligations required of unwed mothers,⁵ survive the intermediate level of equal protection scrutiny required for gender-based classifications.⁶ The majority reasoned that differences between men and women “in relation to the birth process”⁷ permit Congress to regulate citizenship transmission “in a manner specific to each gender.”⁸

In validating this distinction between mothers and fathers, *Nguyen* upheld the deportation of a man who was raised solely by his American father and who lived in the United States for the majority of his life.⁹ Underlying the Court’s rejection of *Nguyen*’s citizenship claim was his father’s failure to fulfill the statutory conditions

whether § 1409 violated “the equal protection component of the Due Process Clause of the Fifth Amendment”).

4. See 8 U.S.C. § 1409(a) (requiring that an unwed American father, seeking to transmit his citizenship to a child born abroad, establish a blood relationship to the child by clear and convincing evidence; be a United States citizen at the time of the child’s birth; agree in writing to provide financial support until the child reaches age eighteen; legalize his paternity through one of three provided methods: legitimation under the law of the child’s residence or domicile, acknowledgment of paternity in writing and under oath, or adjudication of paternity by a competent court; and further requiring that these conditions be fulfilled before the child turns eighteen); see also *id.* (incorporating, by reference, 8 U.S.C. § 1401(g), which establishes a five-year residency requirement for an American parent seeking to transmit American citizenship to a foreign-born child, when the child’s other parent is an alien). Although the language of § 1401(g) does not distinguish between mothers and fathers, § 1409(c) exempts unwed mothers from this five-year residency requirement, rendering the provision applicable exclusively to unwed fathers. See *id.* § 1409(c) (requiring unwed mothers to have lived in the United States for at least one year).

5. See 8 U.S.C. § 1409(c) (legislating that irrespective of the requirements in § 1409(a), a child born abroad and out of wedlock after December 23, 1952 acquires his mother’s American citizenship, if the mother is a U.S. citizen at the time of birth, and if the mother previously had been present in the United States for at least one year).

6. See *Nguyen*, 121 S. Ct. at 2064 (requiring gender-based classifications to have an “exceedingly persuasive justification” (citing *United States v. Virginia*, 518 U.S. 515, 530 (1996))); see also *Craig v. Boren*, 429 U.S. 190, 197 (1976) (explaining that gender-based classifications “must serve important governmental objectives” and must be “substantially related to the achievement of those objectives”); cf. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-28 (1982) (explaining that “[i]n limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened”).

7. *Nguyen*, 121 S. Ct. at 2066; see also *id.* at 2061 (finding that a citizen mother of a child conceived overseas has an opportunity for a meaningful parent-child relationship, which “inheres in the very event of birth,” whereas “it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father’s identity”).

8. *Id.* at 2066.

9. See *infra* notes 61, 63-64 and accompanying text (discussing *Nguyen*’s childhood and upbringing).

mandated for unwed paternal citizenship transmissions.¹⁰ The Court's decision clarifies that Nguyen would be a U.S. citizen and not awaiting deportation if his mother, who abandoned him during infancy, had been an American.¹¹

Four justices dissented in light of this inconsistency. Their dissent received broad support from scholars and legal practitioners, who had expected that the Court's recent jurisprudence,¹² as well as decisions in two circuit courts of appeals,¹³ would lead to a holding that the statute under which Nguyen was deported, 8 U.S.C. § 1409, was unconstitutional.¹⁴ In particular, the dissenting Justices and

10. See *Nguyen*, 121 S. Ct. at 2057 (discussing Nguyen's father's failure to comply with statutory requirements for paternal transmission of citizenship to children born abroad and out of wedlock).

11. See *id.* at 2059 (reciting the statutory provisions for maternal citizenship transmission, which require that an unwed American mother have "the nationality of the United States at the time of" her child's birth and have been "physically present in the United States . . . for a continuous period of one year prior" to the birth); see also 8 U.S.C. § 1409(c) (codifying citizenship transmission requirements for unwed mothers).

12. See *Miller v. Albright*, 523 U.S. 420, 424 (1998) (adjudicating a constitutional challenge to § 1409, but failing to render a clear decision on the constitutional issue because of other factors). Although *Miller* did not strike down § 1409(a), five Justices indicated that they perceived an equal protection problem. Two of these Justices, however, did not reach the constitutional issue because they found that the petitioner lacked standing. See *id.* at 444-53 (O'Connor and Kennedy, JJ., concurring) (explaining that § 1409 "passes rational scrutiny," but disagreeing with Justice Stevens' finding that § 1409(a) "withstands heightened scrutiny"). Justice O'Connor added that "[i]t is unlikely . . . that any gender classification[s] based on stereotypes can survive heightened scrutiny." *Id.* at 451-52; see also *id.* at 460 (Ginsburg, Souter and Breyer, JJ., dissenting) (finding that "§ 1409 classifies unconstitutionally on the basis of gender"). See generally, Cornelia T. L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1 (1998) (criticizing the *Miller* decision and suggesting its potential consequences); Katharine B. Silbaugh, *Miller v. Albright: Problems of Constitutionalization in Family Law*, 79 B.U. L. REV. 1139 (1999) (analyzing *Miller* from the perspective of family law); Kristin Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669 (2000) (analyzing the *Miller* decision in a broader, historical context); Richard G. Wood, Note, *When a Majority Loses on the Merits: Miller v. Albright and the Problem of Splintered Judgments*, 29 SETON HALL L. REV. 816, 823-42 (1998) (analyzing the ramifications of the varied opinions rendered in *Miller*).

13. See *United States v. Ahumada-Aguilar*, 189 F.3d 1121, 1122 (9th Cir. 1999) (holding gender-based provisions in § 1409 unconstitutional), *vacated by United States v. Ahumada-Aguilar*, 121 S. Ct. 2518 (2001); *Lake v. Reno*, 226 F.3d 141, 150 (2d Cir. 2000) (same), *vacated by Ashcroft v. Lake*, 121 S. Ct. 2518 (2001).

14. See David E. Rovella, *Circuit Cases Spell Trouble for INS Laws: Equal Protection Issue May Lead to a Judicial Backlash*, NAT'L L.J., Oct. 30, 2000, at A1 (noting that "many experts think that the U.S. Supreme Court will void [§ 1409(a)] on equal protection grounds . . . in *Nguyen*"); Press Release, ACLU, Supreme Court Citizenship Decision Oks Gender Discrimination, ACLU Says (June 11, 2001), at <http://www.aclu.org/news/2001/n061101c> [hereinafter ACLU Press Release] (characterizing the *Nguyen* decision as a "backwards step in the Court's effort to guarantee constitutional equality for men and women"); cf. *Citizenship and Paternity*, WASH. POST, Jan. 16, 2001, at A20 [hereinafter *Citizenship and Paternity*] (arguing, before the Supreme Court ruled on *Nguyen*, that the government's arguments "don't

others opposed to the majority opinion criticized the majority's failure to apply heightened scrutiny appropriately.¹⁵

Heightened scrutiny requires that a gender-based statutory classification serve "important governmental objectives," and that the discriminatory means employed by the government be "substantially related to the achievement of those objectives."¹⁶ In spite of such requirements, the majority opinion misconstrued one of the interests that the government asserted was served by § 1409¹⁷ and failed entirely to mention the government's other asserted interest.¹⁸

In recognition of these dilemmas, this Comment argues that the Supreme Court's judgment in *Nguyen* was flawed because it failed to evaluate either of the government's asserted interests precisely. This Comment further contends that in so failing, the Court impeded its own ability to evaluate the substantiality of the relationship between

quite cut it"); Michael Dorf, *Sex Discrimination at our Borders? The Supreme Court's Nguyen Case—Parts I & II*, FindLaw's Writ—Legal Commentary at <http://writ.news.findlaw.com/dorf/20010110.html> (last visited June 12, 2001) (suggesting that the government's argument might not convince the Supreme Court); Joanne Mariner, *Citizen Dad: An International Perspective on the Supreme Court's Nguyen Case*, FindLaw's Writ—Legal Commentary, 4, at <http://writ.news.findlaw.com/mariner/20010111.html> (last visited June 12, 2001) (arguing that the Supreme Court "should strike down the provision challenged in *Nguyen*," and predicting the international ramifications of a decision upholding the statute).

15. See, e.g., *Nguyen*, 121 S. Ct. at 2069 (O'Connor, Souter, Ginsburg, and Breyer, JJ., dissenting) ("Contrary to the majority's conclusion, the fit between the means and the ends of § 1409(a)(4) is far too attenuated for the provision to survive heightened scrutiny."); see also *United States v. Virginia*, 518 U.S. 515, 533-34 (1996) (explaining that "sex classifications may be used to compensate women" for economic disadvantage, but not "to create or perpetuate" inequality between men and women); *Craig v. Boren*, 429 U.S. 190, 209 (1976) (suggesting that laws based on "statistically measured but loose-fitting generalities concerning . . . tendencies of aggregate groups" such as men and women, are not likely to satisfy the heightened scrutiny standard); cf. ACLU Press Release, *supra* note 14 (warning of the consequences *Nguyen* poses for the long-standing efforts to achieve constitutionally-protected gender equality).

16. *Craig*, 429 U.S. at 197 (citing *Reed v. Reed*, 404 U.S. 71 (1971)).

17. Compare Respondent's Brief at 11, *Nguyen* (No. 99-2071) (asserting the government's interest in ensuring that foreign-born children "[a]ttain a sufficiently recognized or formal relationship" with their American parent), with *Nguyen*, 121 S. Ct. at 2061 (referring to the government's interest in ensuring that foreign-born children have an "opportunity or potential to develop" a relationship with their American parent). See also *id.* at 2072 (O'Connor, Souter, Ginsburg, and Breyer, JJ., dissenting) (suggesting that the majority's focus on "'opportunity' rather than reality . . . presumably improves the chances of a sufficient means-end fit," but arguing that the majority's interpretation also "dilutes significantly the weight of the interest").

18. See *Nguyen*, 121 S. Ct. at 2076 (O'Connor, Souter, Ginsburg, and Breyer, JJ., dissenting) (criticizing the "majority's failure even to address the INS' second asserted rationale: that § 1409 prevents certain children from being stateless"); see also Respondent's Brief at 11, *Nguyen* (No. 99-2071) (asserting as one of two government interests served by § 1409, "preventing . . . children from being stateless").

either government objective and the gender-based classifications § 1409 creates to achieve them. Finally, this Comment asserts that § 1409 is not substantially related to either government objective. Indeed, as *Nguyen* demonstrates, § 1409's provisions may be self-defeating in certain situations apparently not contemplated by the government or a majority of the Court.¹⁹

Part I describes § 1409 and discusses *Nguyen* in the context of recent Supreme Court and circuit court jurisprudence. Part II examines the Supreme Court's equal protection analysis in *Nguyen*, focusing in particular on the government's two asserted interests of ensuring a verifiable parent-child relationship and preventing children from being born without citizenship in any state.²⁰ Part II argues that the Supreme Court erred in evaluating the importance of both asserted government interests by misconstruing one interest and ignoring the other. Part II also contends that the Court's flawed evaluation of the two asserted interests inhibited its proper scrutiny of the relationship between the interests and the means by which the statute ostensibly achieves them. Part II finally argues that § 1409's discriminatory provisions are not substantially related to the realization of either of the government's proffered objectives. Part II concludes by discussing the national and international ramifications of both § 1409 and the Supreme Court's preservation of its discriminatory provisions in *Nguyen*. Lastly, Part III proposes an amendment to § 1409, which provides a non-discriminatory framework through which the government's dual objectives of

19. See *Citizenship and Paternity*, *supra* note 14, at A20 (pointing out the irony of § 1409, as illustrated in the case of Nguyen's father, Joseph Boulais, who complied with the spirit of the statute by raising and supporting his son, but nevertheless was prevented from transmitting his citizenship because of his failure to legalize his actions—an obligation he would not have faced as a woman); *Supreme Court Upholds Gender-Based Law*, TODAY'S NEWS (June 11, 2000), at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/06-11-2001> [hereinafter *Supreme Court Upholds Gender-Based Law*] (addressing § 1409's contrary result in *Nguyen* because "[a]lthough he offered a family, home and full financial support to his son throughout childhood," Nguyen's father, Joseph Boulais, did not legitimate his actions under the law); see also Amicus Brief of Equality Now and Others in Support of Petitioners at 11, *Nguyen* (No. 99-2071) [hereinafter Brief of Equality Now] (citing concern by the United Nations Human Rights Committee about the potential consequences of stateless children in countries whose laws differentiate between maternal and paternal transmission of citizenship); see also Mariner, *supra* note 14, at 3-4 (noting that laws in some Middle Eastern, Asian, and African countries require children to derive their citizenship from their father, and concluding that, in such countries, a child born to an unmarried American man and a woman who was a national of that country would be subject to a high risk of statelessness). But see Pillard & Aleinikoff, *supra* note 12, at 45 (generalizing that "virtually everywhere today birth to a mother in her home country transmits citizenship").

20. See Respondent's Brief at 11, *Nguyen* (No. 99-2071) (outlining the government's two proffered interests).

ensuring verifiable parent-child relationships and preventing statelessness can be achieved.

I. BACKGROUND

A. *The Source of the Controversy: 8 U.S.C. § 1409*

Title 8, § 1409 of the U.S. Code regulates the *jus sanguinis*,²¹ or blood-based, transmission of U.S. citizenship to persons born outside of the United States to unwed parents, only one of whom is American.²² Congressional treatment of children born abroad to American parents has evolved over the past century.²³ Currently,

21. See, e.g., Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 AM. J. INT'L L. 248, 249-59 (1935) (defining and contrasting the citizenship laws of *jus soli* and *jus sanguinis* jurisdictions). The term *jus soli* applies to jurisdictions, such as the United States, where citizenship of a state is conferred upon persons born in that state. *Id.* at 252. In contrast, *jus sanguinis* applies to jurisdictions in which one's nationality is based on blood, which means that one's citizenship is determined by that of his/her parents. *Id.* at 256.

22. See 8 U.S.C. § 1409 (1994) (regulating parental transmission of U.S. citizenship to children born abroad when the parents are unmarried and only of them one is American).

23. See, e.g., *Miller v. Albright*, 523 U.S. 420, 460-68 (1998) (Ginsburg, Souter and Breyer, JJ., dissenting) (cataloguing a history of U.S. legislation regulating the transmission of citizenship by an American parent to a child born overseas from the first statute, enacted in 1790, to the most recent, amended in 1986); Collins, *supra* note 12, at 1680-99 (presenting a detailed history of § 1409). In *Miller*, Justice Ginsburg explained that the earliest statutes regulating parental transmission of American citizenship to a child born overseas discriminated *in favor* of fathers. See *Miller*, 523 U.S. at 461 (noting that prior to 1934, U.S. legislation granted citizenship to children born overseas only when the father was an American citizen). But see Collins, *supra* note 12, at 1680-81, 1708 n.56 (noting that case law reveals that the paternal statutory right to transmit citizenship did not, in most circumstances, extend to unwed fathers; rather, from "at least the early twentieth century, American women could transmit citizenship to nonmarital children born abroad much more readily than could American men"). Not until the Act of May 24, 1934, codified at 48 Stat. 797, were both fathers and mothers able to transmit their American citizenship to a child born abroad. See, e.g., 7 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE, § 93.04[2][d][iii] (Release No. 95, December 2001) (explaining that the Act of May 24, 1934 extended to mothers the right to transmit American citizenship to foreign-born children). In 1940, Congress passed the first legislation specifically addressing the nationality status of children born out of wedlock. See *id.* § 93.04[2][b] (explaining that the Nationality Act of 1940 was the first statute to adopt specific provisions regulating the citizenship status of children born out of wedlock). The Nationality Act of 1940 created limitations on the paternal transmission of American citizenship to children born out of wedlock. See *id.* § 93.04[2][b]-[c] (explaining that the Nationality Act of 1940 permitted an unwed father to transmit his American citizenship to a foreign-born child only when his paternity was established during the child's minority, through legitimation or court adjudication). In 1986, Congress further conditioned an unwed father's ability to transmit his American citizenship to a foreign-born child, demanding, in addition to the aforementioned prerequisites, the four requirements codified at 8 U.S.C. § 1409(a). *Id.* § 93.04 [2][d][vi]; see *supra* note 4 (listing the current requirements for paternal citizenship transmission, codified at 8 U.S.C. § 1409(a) (1994)).

§ 1409 enumerates four requirements that an unwed American father, seeking to transmit his citizenship to a foreign-born child, must fulfill. First, he must establish his blood relationship to the child by “clear and convincing evidence.”²⁴ Second, he must be a U.S. citizen at the time of the child’s birth.²⁵ Third, he must agree in writing to support the child financially throughout his or her childhood.²⁶ Fourth, before the child reaches age eighteen, an unwed American father must legally legitimate his paternity by acknowledging his paternity under oath or establishing his paternity by “adjudication of a competent court.”²⁷ In addition to these express conditions, § 1409(a) incorporates the residency requirements codified at 8 U.S.C. § 1401(g), thus implicitly requiring unwed fathers to have lived in the United States for at least five years prior to the child’s birth.²⁸

By contrast, a similarly situated unwed American mother can transmit citizenship to a foreign born child by fulfilling only two conditions: she must be a U.S. citizen at the time of her child’s birth and must have been physically present in the United States for a continuous one year period prior to the birth.²⁹

The disparity between the requirements for fathers and those for mothers has generated a chain of constitutional challenges to § 1409,³⁰ resulting most recently in the Supreme Court’s decision in *Nguyen*.

24. *Id.* § 1409(a) (1).

25. *Id.* § 1409(a) (2).

26. *Id.* § 1409(a) (3).

27. *Id.* § 1409(a) (4).

28. *See* 8 U.S.C. § 1401(g) (1994) (imposing a five-year residency requirement for American parents seeking to transmit their citizenship to a foreign-born child, when the child’s other parent is an alien). Although § 1401(g) does not distinguish between mothers and fathers, § 1409(c) expressly reduces the residency requirement for unwed mothers to one year. *See id.* § 1409(c) (requiring unwed mothers, seeking to transmit American citizenship to foreign-born children, to have lived in the United States for at least one year prior to the birth of the child).

29. *Id.* § 1409(c); *see also* REVISION OF IMMIGRATION AND NATIONALITY LAWS, S. Rep. No. 1137, at 4, 39 (1952) (explaining that § 1409(c)’s establishment of a child’s nationality “as that of the mother regardless of legitimation or establishment of paternity is new. It insures that the child shall have a nationality at birth.”).

30. *See* *Miller v. Albright*, 523 U.S. 420, 424 (1998) (ruling on a constitutional challenge to § 1409 but prevented by a standing issue from rendering a clear decision on the statute’s constitutionality); *United States v. Ahumada-Aguilar*, 189 F.3d 1121, 1122 (9th Cir. 1999) (upholding a constitutional challenge to § 1409); *Lake v. Reno*, 226 F.3d 141, 143 (2d Cir. 2000) (same); *Nguyen v. INS*, 208 F.3d 528, 533 (5th Cir. 2000) (rejecting a constitutional challenge to § 1409).

B. The Controversy Surrounding § 1409

Prior to *Nguyen*, federal jurisprudence regarding the constitutionality of § 1409 was vague and inconsistent.³¹ The Court's fractured 1998 decision in *Miller v. Albright* generated a sequence of unsuccessful attempts by several U.S. courts of appeals to envisage how the high Court would rule on a constitutional challenge to the statute.³² Rather than clarify the issue, however, the lower courts fueled the controversy by rendering disparate decisions on similar legal questions.³³

1. Miller v. Albright

Much of the controversy surrounding *Nguyen* stemmed from the Supreme Court's inability to render a clear decision when presented with similar facts four years earlier.³⁴ In *Miller v. Albright*, Lorelyn Penero Miller challenged the constitutionality of § 1409 on behalf of her American father, claiming that the statute denied him the right to transmit his citizenship with the same ease with which it permitted maternal transmissions of citizenship.³⁵ The Court, unable even to agree as to whether Miller had standing to bring the case, delivered a splintered opinion. Four justices ruled against Miller: two found that § 1409 did not violate equal protection mandates,³⁶ and the other two found that the Court lacked the power to provide the requested remedy.³⁷ Five justices indicated that Miller's claims were justifiable:

31. See *Miller*, 523 U.S. at 424 (ruling on the constitutionality of § 1409 but hampered by a standing issue from making a clear decision on the equal protection claim); *Ahumada-Aguilar*, 189 F.3d at 1125-27 (holding § 1409 unconstitutional after interpreting the various opinions in *Miller*); *Lake*, 226 F.3d at 145-48 (same); *Nguyen*, 208 F.3d at 533-35 (following only the plurality opinion in *Miller* and finding that § 1409 meets constitutional guarantees of equal protection); see also *The Last of Gender Stereotyping*, FULTON COUNTY DAILY REPORT, Jan. 9, 2001, at 3 [hereinafter *The Last of Gender Stereotyping*] (describing the inconsistent consequences of attempts by the circuit courts of appeals to interpret the significance of *Miller* in regard to the constitutionality of § 1409), available at LEXIS, Legal Publications Group File.

32. Compare *Ahumada-Aguilar*, 189 F.3d at 1125-27 (interpreting *Miller* as indicating that § 1409 is unconstitutional), and *Lake*, 226 F.3d at 145-49 (same), with *Nguyen*, 208 F.3d at 534-36 (reading *Miller* as upholding the constitutionality of § 1409).

33. See *supra* notes 31-32.

34. See *Miller*, 523 U.S. at 444-90 (rendering four separate opinions on an equal protection claim brought by the out-of-wedlock daughter of a Filipina mother and an American father).

35. *Id.* at 424.

36. See *id.* at 440 (Stevens, J., and Rehnquist, C.J.) (holding that "strong governmental interests justify the additional requirement imposed on children of citizen fathers" and that "the particular means used in § 1409(a)(4) are well tailored to serve those interests").

37. See *id.* at 452-53 (Scalia and Thomas, JJ., concurring) (stating, "it makes no

three found the statute unconstitutional,³⁸ and two found that Miller lacked standing to bring her father's equal protection claim but noted in dicta that the statute would not withstand heightened scrutiny.³⁹ Because the Court ultimately was unable to decide the issue of whether § 1409 violated constitutional guarantees of equal protection,⁴⁰ lower courts were left with little guidance in subsequent challenges to the statute's constitutionality.⁴¹

2. United States v. Ahumada-Aguilar

In 1999, the Ninth Circuit Court of Appeals considered an equal protection challenge to § 1409 when Mexican-born defendant Ricardo Ahumada-Aguilar appealed his conviction for illegal re-entry by an alien with prior felony convictions on the grounds that he had derivative U.S. citizenship from his American father.⁴² The Ninth Circuit evaluated all of the opinions set forth in *Miller* and determined that, had the *Miller* Court been presented with the facts of *Ahumada-Aguilar*, a majority would have applied heightened scrutiny and held § 1409(a)(4), which mandates legitimation of paternity before the child turns eighteen, unconstitutional.⁴³ The Ninth Circuit further reasoned that § 1409(a)(3), which requires unwed fathers to agree in writing to provide financial support, relied

difference whether or not § 1409(a) passes 'heightened scrutiny' and concluding that "[t]he complaint must be dismissed because the Court has no power to provide the relief requested").

38. See *id.* at 472 (Ginsburg, Souter, and Breyer, JJ., dissenting) (finding that § 1409's gender-based distinctions "lack the 'exceedingly persuasive' support that the Constitution requires," and concluding that the statute violates the Fifth Amendment's guarantees of equal protection).

39. See *id.* at 451-52 (O'Connor and Kennedy, JJ., concurring) (disagreeing with Justice Stevens' opinion that the statute withstands heightened scrutiny, and asserting doubt that any gender classification based on stereotypes could survive such scrutiny).

40. See Rovella, *supra* note 14, at A1 (asserting that the Court in *Miller* was "ready to rule the gender differential unconstitutional but was hobbled by a standing issue").

41. See Respondent's Brief at 7 n.5, *Nguyen* (No. 99-2071) (comparing the Second and Ninth Circuits' interpretations of *Miller* with that of the Fifth Circuit and explaining that the former courts of appeals interpreted the varied opinions of *Miller* to indicate that where lack of standing did not preclude a judicial decision, "Justices O'Connor and Kennedy would join Justices Souter, Ginsburg, and Breyer in finding Section 1409(a) unconstitutional"); *The Last of Gender Stereotyping*, *supra* note 31, at 3 (describing the ambiguous precedent set by *Miller* and the inconsistent attempts by the lower courts to interpret its holding regarding the constitutionality of § 1409(a)).

42. See *United States v. Ahumada-Aguilar*, 189 F.3d 1121, 1122 (9th Cir. 1999) (rejecting the classification of petitioner as an "alien" on the basis of his father's failure to meet the unconstitutional requirements of § 1409(a), and reversing petitioner's conviction).

43. See *Ahumada-Aguilar*, 189 F.3d at 1125-27 (noting that *Ahumada-Aguilar* did not present the standing issue that had prevented Justices O'Connor and Kennedy from applying heightened scrutiny in *Miller*).

on the “outdated stereotypes”⁴⁴ that a majority of the *Miller* Court indicated were impermissible justifications for gender based classifications.⁴⁵ The Ninth Circuit ultimately declared both provisions unconstitutional.⁴⁶

3. *Lake v. Reno*

In September 2000, the Second Circuit Court of Appeals was presented with a similar equal protection challenge to § 1409(a).⁴⁷ In *Lake v. Reno*, the petitioner appealed deportation proceedings on the same grounds asserted in *Ahumada-Aguilar* and *Miller*—that he had derived U.S. citizenship from his American father, and therefore, could not be deported.⁴⁸ In its effort to decide the case, the Second Circuit undertook a detailed analysis of the various opinions expressed in *Miller*.⁴⁹ Ultimately, the Second Circuit, like the Ninth Circuit, concluded that the statute was unconstitutional, reasoning that, if faced with the facts of *Lake*, a majority of the *Miller* Court would have found § 1409(a) unconstitutional.⁵⁰

Thus, although the Supreme Court in *Miller* did not strike down § 1409(a), two circuit courts of appeals interpreted a majority of the *Miller* Court to indicate that the provisions could not withstand heightened scrutiny.⁵¹

44. *Id.* at 1126 (citing *J.E.B. v. Alabama*, 511 U.S. 127, 140-42 (1994)).

45. *See Miller*, 523 U.S. at 452 (O'Connor and Kennedy, JJ., concurring) (“it is unlikely . . . that any gender classifications based on stereotypes can survive heightened scrutiny”); *see also id.* at 472 (Ginsburg, Souter, and Breyer JJ., dissenting) (agreeing with Justices O'Connor and Kennedy that gender classifications based on stereotypes are unlikely to survive heightened scrutiny and adding that § 1409's “gender-based distinctions lack the ‘exceedingly persuasive’ support that the Constitution requires”).

46. *See Ahumada-Aguilar*, 189 F.3d at 1122 (holding that §§ 1409(a)(3) and (a)(4) are unconstitutional, “because a majority of the U.S. Supreme Court [in *Miller*] has effectively so declared”).

47. *Lake v. Reno*, 226 F.3d 141 (2d Cir. 2000).

48. *Id.* at 143.

49. *See id.* at 144-57 (noting that “in the absence of an authoritative majority opinion from the Supreme Court, we must seek our guidance from the available expressions of the various views of its members”); *id.* (citing *Tran South Fin. Corp. v. Bell*, 149 F.3d 1292, 1296-97 (11th Cir. 1998) (noting that plurality opinions of the Supreme Court are not binding) and *Jacobsen v. United States Postal Serv.*, 993 F.2d 649, 654-55 (9th Cir. 1993) (analyzing the various opinions of the Supreme Court in a plurality decision)).

50. *See Lake* 226 F.3d at 148 (“seven justices in *Miller* would have applied heightened scrutiny in these circumstances, and five of the justices would have found the government's justification for the statute insufficient to satisfy that standard”).

51. *Id.* at 148; *Ahumada-Aguilar*, 189 F.3d at 1125-27.

4. *Nguyen v. INS*

Despite the consensus between the Ninth and Second Circuit Courts of Appeals regarding the significance of *Miller* and the unconstitutionality of § 1409(a), the Fifth Circuit departed from their approach in April 2000, when Tuan Anh Nguyen and his father, Joseph Boulais, challenged the statute.⁵² Instead of analyzing the varied opinions expressed by the Supreme Court in *Miller*, the Fifth Circuit applied *Miller's* plurality holding and rejected Nguyen's constitutional challenge.⁵³

Recognizing the inconsistency in the lower courts' interpretations of *Miller*, the Supreme Court granted certiorari to *Nguyen* to decide ultimately whether the gender-based disparities in § 1409 violate the Constitution.⁵⁴

II. THE SUPREME COURT'S FLAWED EQUAL PROTECTION ANALYSIS IN *NGUYEN* AND ITS CONSEQUENCES

In reviewing *Nguyen*, the Supreme Court acknowledged its duty to apply heightened scrutiny in its evaluation of the constitutionality of § 1409.⁵⁵ Nevertheless, the Court's equal protection analysis was fundamentally flawed in at least two important ways. First, the Court modified the specific interest in ensuring parent-child relationships, which the government claimed was served by § 1409, and thus, failed to evaluate the precise interest asserted by the government.⁵⁶ Additionally, the Court failed to address the second interest that the government asserted was served by the statute, namely, the prevention of statelessness.⁵⁷ By erring in its duty to evaluate the

52. See *Nguyen v. INS*, 208 F.3d 528, 533-35 (5th Cir. 2000) (explaining that the plurality opinion in *Miller* found that § 1409 did not violate the equal protection clause and granting the government's motion to dismiss the appeal).

53. *Id.* at 535-36.

54. *Nguyen v. INS*, 530 U.S. 1305 (2000) (granting certiorari).

55. See *Nguyen v. INS*, 121 S. Ct. 2053, 2059 (reciting the constitutional requirements for a gender-based classification to withstand heightened scrutiny: the classification must serve important governmental objectives and the discriminatory means employed by the classification must be substantially related to such objectives).

56. Compare Respondent's Brief at 11, *Nguyen* (No. 99-2071) (asserting the government's interest of ensuring that "children who are born abroad out of wedlock have, during their minority, attained a sufficiently recognized or formal relationship to their United States citizen parent") (emphasis added), with *Nguyen*, 121 S. Ct. at 2061 (citing a weakened interpretation of the government's interest in ensuring that "the child and the citizen parent have some demonstrated opportunity or potential to develop" a parent-child relationship) (emphasis added).

57. See *Nguyen*, 121 S. Ct. at 2076 (O'Connor, Souter, Ginsburg, and Breyer, JJ., dissenting) (criticizing "the majority's failure even to address the INS' second asserted rationale: that § 1409 prevents certain children from being stateless");

importance of at least one of the two precise interests that the government claimed were furthered by § 1409, the Court also impeded its own ability to evaluate the substantiality of the relationship between either of the interests and the means by which the statute sought to realize them.⁵⁸ Had the Court properly evaluated the government's asserted interests and the statute's provisions, it would have recognized that neither interest was substantially related to the statute.⁵⁹

A. *The Supreme Court Upholds § 1409*

Free from the legal standing impasse that prevented two justices from ruling on the merits of *Miller*,⁶⁰ *Nguyen* presented an opportunity for the Supreme Court to settle the much-controverted issue of whether § 1409 violates constitutional guarantees of equal protection. Moreover, in light of Joseph Boulais' role as the exclusive, biological parental presence in Nguyen's life,⁶¹ the facts of *Nguyen* were particularly well suited for analyzing an equal protection challenge to § 1409.

1. *The facts of Nguyen*

The petitioner, Tuan Anh Nguyen, was born in Saigon, Vietnam, in 1969 to an unmarried American father and Vietnamese mother.⁶² Shortly after Nguyen's birth, his mother ended her relationship with Nguyen's father, Joseph Boulais, leaving him alone to raise their child.⁶³ Ultimately, Boulais and his new wife raised Nguyen in Texas,

Respondent's Brief at 17, *Nguyen* (No. 99-2071) (contending that § 1409 promotes a second important governmental interest of preventing statelessness).

58. See *Nguyen*, 121 S. Ct. at 2059 (acknowledging the Court's duty to evaluate the importance of the government's proffered interests and the substantiality of the relationship between such interests and the discriminatory means by which the government-designated classifications enable their achievement); see also *id.* at 2069 (O'Connor, Souter, Ginsburg, and Breyer, JJ., dissenting) (criticizing the majority opinion for its flawed application of the heightened scrutiny standard).

59. See *infra* Part II.A.3 (discussing the Court's obligation to evaluate the substantiality of the relationship between the government's asserted interests and the statute's provisions, and criticizing the Court's analysis for failing to recognize that the connection between such interests and the statute is wanting).

60. See *Miller v. Albright*, 523 U.S. 420, 452 (1998) (O'Connor and Kennedy, JJ., concurring) (finding that *Miller* lacked standing to challenge the constitutionality of § 1409 on her father's behalf).

61. See Petitioners' Brief at 4-5, *Nguyen* (No. 99-2071) (explaining that from early infancy, Nguyen lived with his father, and noting that in 1975, when Nguyen was six years old, Boulais lost contact with Nguyen's mother and now does not even know if she survived the Vietnam War).

62. *Nguyen*, 121 S. Ct. at 2057.

63. *Id.* See also Petitioners' Brief at 4, *Nguyen* (No. 99-2071) (describing events leading to Nguyen's constitutional challenge to § 1409); Nguyen, Tuan, et al. v. Immigration & Naturalization Service, *Opinion Issued*, at

where Nguyen lived from age six as a lawful permanent resident.⁶⁴ Although Boulais raised and provided financial support to Nguyen throughout Nguyen's minority, he did not legally establish his paternity until 1998, when Nguyen was twenty-eight years old.⁶⁵

In 1992, at age twenty-two, Nguyen pled guilty to two felony charges and was sentenced to eight years in prison on each count, to be served concurrently.⁶⁶ While Nguyen was serving his sentence, the Immigration and Naturalization Service (INS) initiated deportation proceedings against him, characterizing him as "an alien who had been convicted of two crimes involving moral turpitude," as well as an aggravated felony.⁶⁷

In January 1997, the immigration judge ordered Nguyen deported to Vietnam.⁶⁸ Nguyen appealed the order to the Board of Immigration Appeals (BIA), challenging his deportation on the grounds that he was an American citizen, having been born to an American citizen parent.⁶⁹ When the BIA dismissed the claim, Nguyen appealed to the Fifth Circuit Court of Appeals, and ultimately to the U.S. Supreme Court,⁷⁰ alleging the same complaint adjudicated in *Ahumada-Aguilar* and *Lake*—that § 1409's gender-based citizenship transmission requirements are unconstitutional.⁷¹

<http://www.medill.nwu.edu/cases> (last visited Feb. 13, 2002) [hereinafter *On the Docket*] (noting Nguyen's abandonment by his mother).

64. Petitioners' Brief at 4-5, *Nguyen* (No. 99-2071); *On the Docket*, *supra* note 63. Boulais and his wife raised Nguyen in Vietnam during Nguyen's infancy. In 1975, when Nguyen was six years old, Saigon fell to North Vietnamese communist forces. At the time, Boulais and his wife were traveling and Nguyen was staying with his step-grandmother. Nguyen and his step-grandmother escaped on a refugee ship bound for the United States and soon met up with Nguyen's father and step-mother. Nguyen spent the remainder of his childhood with his family in Texas. *On the Docket*, *supra* note 63.

65. *Nguyen*, 121 S. Ct. at 2057; Petitioners' Brief at 4-5, *Nguyen* (No. 99-2071); *On the Docket*, *supra* note 63.

66. See *Nguyen*, 121 S. Ct. at 2057 (describing Nguyen's conviction for sexual assault on a child); Petitioners' Brief at 6, *Nguyen* (No. 99-2071) (explaining that the court ordered Nguyen's sentences to be served concurrently).

67. See *Nguyen*, 121 S. Ct. at 2057 (citing 8 U.S.C. §§ 1227(a)(2)(A)(ii)-(iii) (Supp. IV 1994), which authorize deportation for multiple criminal convictions of crimes involving moral turpitude and for aggravated felony convictions); see also Petitioners' Brief at 6, *Nguyen* (No. 99-2071) (describing the basis for deportation proceedings in §§ 1227(a)(2)(A)(ii)-(iii)).

68. Petitioners' Brief at 6, *Nguyen* (No. 99-2071).

69. See *id.* at 7 n.2 (explaining that former 8 U.S.C. § 1105 governed Nguyen's petition for review by the BIA, as amended by "transitional" judicial review rules, which apply to deportation proceedings initiated prior to April 1, 1999).

70. See generally *Nguyen v. INS*, 208 F.3d 528, 535-36 (5th Cir. 2000) (upholding the BIA's finding that Nguyen was deportable and granting the INS's motion to dismiss Nguyen's appeal), *aff'd*, 533 U.S. 53 (2001).

71. See Petitioners' Brief at 11, *Nguyen* (No. 99-2071) (arguing that § 1409's sex-based classifications violate the Fifth Amendment's guarantee of equal protection).

2. *Heightened review of § 1409*

Although the quality of the Supreme Court's analysis of § 1409 has been widely criticized,⁷² the Court acknowledged its duty to apply heightened review, as required for gender-based classifications, in its analysis of *Nguyen*.⁷³ Heightened review demands that the government interest served by the discriminatory classification be "important," and that the discriminatory means used to realize that interest be "substantially related" to the interest.⁷⁴

a. *The government's important interests*

The *Nguyen* Court recongized two important interests, which the government claimed were furthered by § 1409: (1) the assurance of the existence of a biological parent-child relationship and (2) the assurance that the child and citizen parent have "some demonstrated opportunity or potential to develop" a relationship that consists of "the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States."⁷⁵

In fact, the government did assert two interests, but only one addressed the relationship between the citizen parent and foreign-

72. See *supra* note 14 (summarizing various critiques of *Nguyen*).

73. See *Nguyen*, 121 S. Ct. at 2059 (explaining that gender-based classifications must serve important governmental objectives and that the discriminatory means employed must be substantially related to the achievement of the government's objectives, and holding that "§ 1409 satisfies this standard"). Although much analysis has focused on the INS' contention that Congressional plenary power precludes the Court from applying heightened scrutiny or providing relief, the Supreme Court did not reach this issue in *Nguyen*; therefore, it is beyond the scope of this Comment. For a discussion of the effects of Congressional plenary power on the Supreme Court's ability to analyze the constitutionality of citizenship legislation, see, e.g., *Fiallo v. Bell*, 430 U.S. 787 (1977) (holding that Congress' power to deport or exclude aliens is largely immune from judicial control); Respondent's Brief at 9, *Nguyen* (No. 99-2071) (asserting congressional power over naturalization and citing *Fiallo*); Dorf, *supra*, note 14 (explaining the plenary power doctrine and the INS' related argument in *Nguyen*); Raju Chebium, *U.S. Supreme Court to Hear Fathers' Rights Challenge to Immigration Law*, CNN.COM (Jan. 5, 2001), at <http://www.cnn.com/2001/LAW/01/05/scotus.nguyen.v.INS/> (quoting the government's argument that "Courts are particularly ill-suited to second-guess Congress's [sic] judgments about what classes of persons should be eligible for statutory citizenship"); see also Rovella, *supra* note 14, at A1 (citing the Supreme Court's *Fiallo* precedent for deferring to Congress in immigration issues). But cf. *Hearings on H.R. 6127 Before the House Comm. on Immigration and Naturalization*, 76th Cong. 421 (1940) (statement of Richard W. Flournoy, Assistant Legal Adviser, State Department) [hereinafter *Hearings*] (discussing the historical interpretation of citizenship requirements for a child born abroad to parents of whom one is an American and the other is not); *id.* (enunciating that the requirements are conditions subsequent and that failure to fulfill them may remove citizenship but cannot not prevent its automatic inherence upon the child's birth).

74. *Nguyen*, 121 S. Ct. at 2064 (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996) and *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

75. *Nguyen*, 121 S. Ct. at 2060-61.

born child; the other addressed the prevention of statelessness.⁷⁶ Moreover, the Court's description of the government interest in the parent-child relationship differs from the government's own description, which claimed that § 1409 serves to ensure that children born abroad and out of wedlock "have . . . attained" a sufficient relationship with their citizen parents.⁷⁷ Although this description is *similar* to the Court's, there is a substantial distinction between ensuring that a parent and child "have attained" such a relationship and ensuring that a parent and child have "some demonstrated opportunity or potential to develop" such a relationship.⁷⁸ Indeed, as Justice O'Connor asserted in her dissent, the Court's adaptation of the government's interest in the parent-child relationship "presumably improves the chances of a sufficient means-ends fit," but also "dilutes significantly the weight of the interest."⁷⁹ Whereas the basis for the government's asserted interest in the parent-child relationship is the corresponding link between the child and the United States, the Court's diluted "opportunity" for such a bond is so remote from the ultimate objective that its importance becomes questionable.⁸⁰

Moreover, as Justice O'Connor also suggested, assuming, *arguendo*, that the assurance of such an opportunity is a valid governmental objective, neither the government nor the Court explained the importance of proving the existence of such an opportunity before

76. See Respondent's Brief at 11, *Nguyen* (No. 99-2071) (asserting two governmental interests: first, the assurance that children born abroad and out of wedlock have achieved a recognized relationship with their U.S. citizen parent, and second, the prevention of children being born stateless).

77. Compare *id.* (asserting the government's interest of ensuring that "children who are born abroad out of wedlock have, during their minority, attained a sufficiently recognized or formal relationship to their United States citizen parent") (emphasis added), with *Nguyen*, 121 S. Ct. at 2061 (citing the government's interest in ensuring that "the child and the citizen parent have some demonstrated *opportunity or potential* to develop" a parent-child relationship) (emphasis added); see also *Nguyen*, 121 S. Ct. at 2069 (O'Connor, Souter, Ginsburg, and Breyer, JJ., dissenting) (expressing the view that the "disparity between the majority's defense of the statute and the INS' proffered justifications is striking, to say the least").

78. See *supra* note 77; see also *Nguyen*, 121 S. Ct. at 2069-70 (O'Connor, Souter, Ginsburg, and Breyer, JJ., dissenting) (criticizing the majority's alterations to the government's asserted interest in light of the Court's duty to determine whether the proffered interest is "exceedingly persuasive").

79. *Nguyen*, 121 S. Ct. at 2072 (O'Connor, Souter, Ginsburg, and Breyer, JJ., dissenting).

80. See *id.* (O'Connor, Souter, Ginsburg, and Breyer, JJ., dissenting) (doubting the benefit to be gained from a "'demonstrated opportunity' for a relationship," and observing the reality that children who have such an "opportunity" for a relationship with a parent may, nevertheless, fail to develop an actual relationship with that parent).

the child reaches age eighteen.⁸¹ The facts of *Nguyen* demonstrate that, even without legally establishing paternity before the child turns eighteen, an unwed father may nevertheless develop the “real, everyday ties” that the Court recognized as the statute’s objective.⁸² In this respect, even if the Supreme Court properly found that the government’s interest in ensuring an opportunity for a substantive relationship between an unwed father and his foreign-born child is important, the Court still failed to describe the substantial connection between that goal and § 1409(a)’s paternally-discriminatory provisions.⁸³

b. Preventing statelessness

Although the majority does not address it, the government asserted that § 1409 serves a second important interest—preventing statelessness.⁸⁴ Unquestionably, preventing individuals from being born without citizenship in any country is an important objective.⁸⁵

81. See *id.* (O’Connor, Souter, Ginsburg, and Breyer, JJ., dissenting) (questioning how § 1409’s requirement for obtaining proof of an opportunity for a parent-child relationship, before the child turns eighteen, substantially furthers the asserted interest); see also 8 U.S.C. § 1409(a)(4) (1994) (requiring the legal establishment of paternity by one of three provided methods before a child reaches age eighteen).

82. See, e.g., Chebium, *supra* note 73 (noting that § 1409 bars Boulais from transmitting his citizenship to Nguyen despite supporting the child from infancy); *Citizenship and Paternity*, *supra* note 14, at A20 (arguing that § 1409 rests on a stereotype that does not justify requiring fathers, such as Boulais, who do raise their children, to meet burdens not placed on women); *Supreme Court Upholds Gender-Based Law*, *supra* note 19 (noting the denial of Nguyen’s claim of U.S. citizenship because “although he offered a family, home and full financial support to his son throughout childhood,” Boulais neglected to legitimate his actions under the law).

83. See, e.g., *Nguyen* 121 S. Ct. at 2069 (O’Connor, Souter, Ginsburg, and Breyer, JJ., dissenting) (criticizing the majority for failing to examine sufficiently the purposes of § 1409 and for accepting an inadequate fit between the means and the ends of § 1409); see also *infra* Part II.A.3.a (analyzing the majority’s scrutiny of the government’s asserted interest in the parent-child relationship).

84. See *Nguyen*, 121 S. Ct. at 2076 (O’Connor, Souter, Ginsburg, and Breyer, JJ., dissenting) (criticizing the majority for failing “even to address the INS’ second asserted rationale: that § 1409 prevents certain children from being stateless”); see also Respondent’s Brief at 11, 17, *Nguyen* (99-2071) (explaining the importance of preventing statelessness, which becomes increasingly likely in situations where children are born abroad and subjected to the conflicting laws of *jus soli* and *jus sanguinis* jurisdictions); cf. Sandifer, *supra* note 21, at 258-59 (describing the potential for statelessness when children are born “illegitimate” in a foreign country).

85. See, e.g., Final Act of the United Nations Conference on the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117, 122-24 (asserting the international goal of regulating and improving the status of stateless persons); Convention on the Reduction of the Number of Cases of Statelessness, Sept. 13, 1973, 1081 U.N.T.S. 283, 288 (declaring the international goal of reducing statelessness); cf. Wood, *supra* note 12, at 826 n.1 (explaining that even though the United States is not a signatory to the Convention Relating to the Status of Stateless Persons or the Convention on the Reduction of Statelessness, “a plurality of the United States Supreme Court has concluded that banishment violates the Eighth Amendment’s ban on cruel and unusual punishment”) (citing *Trop v. Dulles*, 356 U.S. 86, 103 (1958)). But see

Moreover, § 1409's recent history reveals that legislators hesitated to extend the burdensome measures required of unwed fathers to unwed mothers precisely because of their fear that such conditions could result in a child being born to an American parent without citizenship in any country.⁸⁶ However, in spite of the clear importance of preventing statelessness, neither the legislative history; the statute itself; nor the government, arguing on behalf of the INS in *Nguyen*, offered evidence of a substantial relationship between the government's interest in preventing statelessness and the discriminatory means employed to do so.⁸⁷

Respondent's Brief at 10, *Nguyen* (99-2071) (conceding that if the government were forced to amend § 1409 to comply with equal protection requirements, it would choose to deny unwed mothers their current preference and thus eliminate the means by which it ostensibly realizes its objective of preventing statelessness); Pillard & Aleinikoff, *supra* note 12, at 45 (suggesting that "virtually everywhere today birth to a mother in her home country transmits citizenship").

86. See, e.g., REVISION OF IMMIGRATION AND NATIONALITY LAWS, S. REP. NO. 82-1137, at 39 (1952) (explaining that the provisions of § 1409 establishing a child's nationality "as that of the mother regardless of legitimation or establishment of paternity . . . insures that the child shall have a nationality at birth."). But see *Hearings*, *supra* note 73, at 431 (explaining that the State Department has "at least since 1912, uniformly held that an illegitimate child born abroad of an American mother acquires at birth the nationality of the mother, in the absence of legitimation or adjudication establishing the paternity of the child"). The American legal tradition historically has regarded the mother of a child born out of wedlock as having "a right to custody and control of such a child as against the putative father, and [as being] bound to maintain [the child] as its natural guardian." *Id.* It is evident, then, that the 1940 and 1952 amendments to § 1409, which enumerate the varied requirements that an unwed father must fulfill to transmit his American citizenship to a child born abroad, do not extend to unwed mothers because legislators feared that placing such conditions on American mothers would hasten the possibility that children of an American citizen would be born stateless. Nevertheless, the ease with which U.S. legislators historically have facilitated an unwed mother's transmission of her American citizenship to a child born abroad seems to stem from a conventional view of the mother as responsible and the father as free from parental responsibility for children born out of wedlock. See *Nguyen*, 121 S. Ct. at 2075-6 (O'Connor, Souter, Ginsburg, and Breyer, JJ., dissenting) (interpreting the legislative discussion in *Hearings*, *supra* note 73, to indicate that § 1409(a)(4) is "paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children").

87. Indeed, Congress' considerations apparently ignored the possible, though perhaps less likely, scenario in which a child is born out of wedlock in a *jus sanguinis* jurisdiction, which exclusively permits patrilineal derivative citizenship. In such a scenario, the government-imposed burdens on an unwed father's ability to transmit his citizenship would amplify, rather than reduce, the likelihood that the child would be stateless, while the relaxed requirements for an unwed mother would have no effect. See, e.g., Mariner, *supra* note 14 (explaining that some countries, including Algeria, Kuwait, and Nepal, *only* recognize citizenship by descent from the father, and noting that, in those countries, a woman's inability to transmit her citizenship is "enshrined in the constitution"); Brief of Equality Now, *supra* note 19, at 11 (citing concern by the United Nations Human Rights Committee about the potential consequences of stateless children in countries whose laws differentiate between maternal and paternal transmission of citizenship); cf. Gary Endelman & Bill Coffman, *The Changing Face of Equal Protection: Gender Bias in U.S. Citizenship Law*, 95-03 IMMIGR. BRIEFINGS 1 app. (1995) (comparing citizenship laws of various nations);

3. *The substantiality of the relationship between the government's interests and its discriminatory means of achieving them*

The Supreme Court's long-standing test for evaluating whether a statute withstands heightened scrutiny required that the government establish the existence of a substantial relationship between at least one of the interests purportedly served by the statute and the discriminatory means by which the statute sought to realize that interest.⁸⁸ Thus, to prevent the Court from striking down § 1409, the government needed to show a substantial relationship between the purported goal of ensuring a parental relationship and the additional limitations imposed solely on unwed American fathers who wish to transmit their citizenship to children born abroad to non-American mothers.⁸⁹ Alternatively, the government needed to show a substantial relationship between its decision to place these burdens exclusively on fathers and the purported goal of preventing statelessness.⁹⁰

a. *Discriminating to ensure a relationship between the citizen parent and the child born abroad*

The government asserted that § 1409's conditions on the transmission of American citizenship by an unwed citizen father ensure that such a parent "has attained the same legal relation to the child, at some point while the child is still a minor, as both a married

Andy Sundberg, *American Citizens Abroad Position Paper on Citizenship* (1995), available at <http://www.aca.ch/ppcitiz.htm> (noting that each year, ten percent (about 4,000) of all children born overseas to an American citizen parent do not acquire U.S. citizenship at birth). *But see* Pillard & Aleinikoff, *supra* note 12, at 45 (suggesting that concerns of statelessness are minimal because "most states permit transmission of the mother's citizenship even when the birth occurs outside the mother's state of citizenship").

88. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (explaining that gender-based classifications must serve "important governmental objectives" and the discriminatory means employed must be "substantially related to the achievement of those objectives"); *United States v. Virginia*, 518 U.S. 515, 530-31 (1996) (requiring gender-based classifications to have an "exceedingly persuasive justification").

89. *See* Respondent's Brief at 33-34, *Nguyen* (99-2071) (claiming that § 1409 furthers the government objective of ensuring that an unwed American father "whose child is to be made a citizen under Section 1409(a) has attained the same legal relation to the child, at some point while the child is still a minor, as both a married citizen father and a married citizen mother have *at birth*") (emphasis in original).

90. *See id.* at 8 (explaining that Congress decided not to extend the requirements mandated in § 1409(a) to unwed American mothers for fear that their foreign-born children could become stateless if not granted U.S. citizenship); REVISION OF IMMIGRATION AND NATIONALITY LAWS, S. REP. NO. 82-1137, at 39 (1952) (explaining that the legislative intent of § 1409(c) was to ensure that children born to American mothers overseas have a nationality at birth).

citizen father and a married citizen mother have *at birth*.⁹¹ The government further explained that such requirements are not mandated for unwed mothers because mother-child relationships are “almost invariably established by the fact of maternity.”⁹² Thus, the government contended that, to satisfy its objective of ensuring the attainment of a parent-child relationship between unwed parents and their foreign-born children, it must insist on tangible proof of paternal relationships, but can infer the existence of maternal relationships from the physical act of childbirth.⁹³

This contention fails in both respects. As the facts of *Nguyen* illustrate, § 1409(a)’s conditions on paternal citizenship transmission may deny citizenship in cases where a legitimate parent-child relationship exists, thus defeating the very purpose of the provision.⁹⁴ On the other hand, fathers who do fulfill the statutory conditions may have nothing more than a genetic, financial, and legal relationship with their child,⁹⁵ also defeating the statute’s objective of ensuring the “real, everyday ties” between the child and citizen parent.⁹⁶ Similarly, the statute’s acceptance of the act of birth, alone,

91. Respondent’s Brief at 33-34, *Nguyen* (No. 99-2071) (emphasis in original).

92. *Id.* at 34. The notion that a maternal relationship is “invariably established” by the act of giving birth rests on several assumptions about a mother’s behavior and about the process of recording childbirth. See, e.g., *Nguyen* 121 S. Ct. 205, 2070 (2001) (O’Connor, Souter, Ginsburg, and Breyer, JJ., dissenting) (pointing out that “a mother will not always have formal legal documentation of birth because a birth certificate may not issue or may subsequently be lost”); Kif Augustine-Adams, *Gendered States: A Comparative Construction of Citizenship and Nation*, 41 VA. J. INT’L L. 93, 107-08 (2000) (arguing that “the degree to which hospital records and birth certificates ‘typically establish’ the blood relationship between a mother and a child is culturally dependent and may not be as reliable for establishing the required blood relationship” as Congress and the Court suggest; and also citing “recent discoveries of baby-switching at hospitals” as evidence that “the blood relationship between a mother and a specific child is not immediately and clearly obvious at other moments even shortly after birth”); Pillard & Aleinikoff, *supra* note 12, at 20 (suggesting that an unmarried woman might abandon her child, thus negating the assumption that giving birth should equate with the establishment of a mother-child relationship); *id.* at 7 n.100 (citing a UNICEF study, which found that one-third of all births abroad occur without birth certificates, thus undermining the assumption that proof of maternity always results from childbirth).

93. Respondent’s Brief at 33-34, *Nguyen* (No. 99-2071).

94. See *supra* notes 61, 63-64, 82 and accompanying text (discussing the enduring parental relationship between Boulais and Nguyen in spite of Boulais’ failure to legitimate their ties on paper or in court).

95. See 8 U.S.C. § 1409(a) (1994) (conferring American citizenship on children born overseas and out of wedlock when their American citizen fathers establish a biological and legal paternal relationship, agree in writing to support the child financially until age eighteen, and fulfill these obligations before the child turns eighteen).

96. See *Nguyen*, 121 S. Ct. at 2061 (characterizing the government’s interest in the parent-child relationship as seeking to ensure the opportunity for the development of “the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States”); Respondent’s Brief at 33-34, *Nguyen* (No. 99-2071).

as sufficient evidence of a maternal relationship presumes a substantive parental relationship even in cases where such a relationship is absent, such as when mothers ultimately abandon their children.⁹⁷

By neglecting to acknowledge legitimate relationships in some circumstances, while baselessly presuming the existence of such relationships in others, § 1409 fails to substantially promote the government's goal of ensuring the attainment of genuine parent-child relationships. Instead, the statute appears to rely on, and functions to endorse, generalizations regarding the traditional parenting roles of mothers and fathers.⁹⁸ Moreover, even if, in practice, unwed mothers more frequently maintain parental relationships with their children than do unwed fathers, that tendency does not justify disparate legal treatment of unwed fathers and mothers.⁹⁹ As Justice O'Connor indicated, "overbroad sex-based

(citing the government interest in ensuring that unwed fathers have attained a relationship with their foreign-born children, during youth, similar to the relationship between married citizen parents and their children at birth).

97. See *supra* note 92 (discussing various circumstances, including abandonment, in which childbirth does not result in an actual relationship between a mother and her child).

98. See Respondent's Brief at 9, *Nguyen* (No. 99-2071) ("It remains the case that an unwed father typically will have no legally recognized parental rights or responsibilities toward his child, and will not be similarly situated to an unwed mother . . . unless he takes steps to formalize the paternal relationship."); see also, e.g., Chebium, *supra* note 73, at 2 (citing NOW Legal Defense's characterization that § 1409 relies on "outdated stereotypes concerning men's and women's parenting roles" and noting that *Nguyen* illustrates the inaccuracy of such generalizations in its depiction of a mother who abandoned her child and a father who cared for him from infancy); Augustine-Adams, *supra* note 92, at 98 (asserting that "it is not biological difference itself but the social meaning ascribed to biology that provides the basis for differentially regulating the ability of men and women to transmit citizenship to their children"); *Citizenship and Paternity*, *supra* note 14, at A20 (suggesting that even if the government's generalizations about men's and women's parental roles are true "on average," such truth does not justify requiring those fathers who do raise their children to meet unparalleled, gender-specific burdens); Catharine MacKinnon, *Can Fatherhood be Optional?*, N.Y. TIMES, June 17, 2001, at 15A (asserting that the Court's "distinction on biological grounds entrenches unequal social assumptions into equality law—promoting women's disadvantage even as it favors them"); cf. Pillard & Aleinikoff, *supra* note 12, at 18-19 (analyzing the *Miller* decision in which the government invoked the same interests as justification for § 1409, and criticizing Justice Stevens' reliance on sex-based generalizations of what "typically," "normally," or "often" is the scenario for women and men in regards to out-of-wedlock births); Collins, *supra* note 12, at 1672-73 (arguing that the history of the transmission of American citizenship illustrates that "[t]he allocation of parental rights is always correlated with the allocation of parental responsibility. This basic legal truism, and its numerous implications for citizenship law, suggests that the principal gender injustice caused by § 1409 is . . . its creation and perpetuation of a legal regime in which mothers assume *full* responsibility for foreign-born nonmarital children.") (emphasis added).

99. Cf. *Nguyen*, 121 S. Ct. at 2071 ("facially neutral laws that have a disparate impact are a different animal for purposes of constitutional analysis than laws that

generalizations are impermissible even when they enjoy empirical support.”¹⁰⁰

Although the government insisted that § 1409 does not rely on gender-based stereotypes,¹⁰¹ it is interesting to reconsider the statute from a different perspective. If the Court had viewed the requirements of § 1409(a) as a means to enable unwed men seeking to avoid the burdens of paternity, while viewing the absence of such requirements for women in § 1409(c) as a means of obliging women to accept the burdens of maternity, perhaps its application of heightened scrutiny would have yielded a distinct majority opinion.¹⁰² Indeed, upholding § 1409’s *de facto* imposition of the legal, social, and economic burdens of parenthood on women exclusively would contradict the Supreme Court’s own assertion in *United States v. Virginia*, that “sex classifications . . . may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.”¹⁰³

b. Discriminating to prevent statelessness

The government offered a distinct justification for its use of gender-based classifications to prevent statelessness.¹⁰⁴ In support of its goal of ensuring a parent-child relationship, the government

specifically provide for disparate treatment. We have long held that the differential impact of a facially neutral law does not trigger heightened scrutiny.”) (citing *Washington v. Davis*, 426 U.S. 229 (1976)).

100. *Id.* at 2067 (O’Connor, Souter, Ginsburg and Breyer, JJ., dissenting) (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 (1994); *Craig v. Boren*, 429 U.S. 190, 199 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975)).

101. See Respondent’s Brief at 34, *Nguyen* (No. 99-2071) (rejecting the charge that the basis for treating unwed fathers distinctly from unwed mothers is grounded in a stereotype about each gender’s relative roles and capacities as parents).

102. See Silbaugh, *supra* note 12, at 1159 (“Why deny mothers the privilege of escape conferred on fathers?”); Collins, *supra* note 12, at 1673-74 n.21 (suggesting that the distinctions between maternal and paternal rights as provided in § 1409 are a function of “common-law default rules that . . . allocate full, legal responsibility for nonmarital children to mothers, while fathers’ prerogatives and autonomy are given great deference”); *id.* (arguing that equal protection analysis of § 1409 in terms of parental rights “lends itself to a kind of circularity: Because an unwed mother has superior legal responsibilities, she automatically receives superior parental rights. The default allocation of parental responsibility to unwed mothers, common to so many statutes, escapes equal protection scrutiny.”); MacKinnon, *supra* note 98, at A15 (contending that the majority opinion “assumed that motherhood is passive, automatic and natural while fatherhood is active, voluntary and legal. To be a mother, you just have to be there; to be a father, you have to do things.”).

103. *United States v. Virginia*, 518 U.S. 515, 533-34 (1996) (citing *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948)).

104. See Respondent’s Brief at 8, *Nguyen* (No. 99-2071) (explaining that Congress feared foreign-born children of unwed American mothers could become stateless if they were not granted United States citizenship and accordingly addressed the fear by defining a “class of citizen mothers whose foreign-born children are statutory citizens at birth”).

essentially argued that the conditions enumerated in § 1409(a) were crucial only for fathers—implying that the conditions constituted burdens above and beyond the standard regulations which are applied to unwed mothers and married mothers and fathers.¹⁰⁵ Regarding the prevention of statelessness, the government insisted that unwed mothers not only should be exempt from these additional burdens imposed upon unwed fathers, but should be granted the right to transmit citizenship almost unconditionally to children born abroad.¹⁰⁶

Section 1409(c)'s exemption for women from the burdensome conditions imposed upon unwed American men may indeed prevent some children from being born without citizenship in any country, as unwed American women are able to transmit their citizenship to foreign-born children with ease.¹⁰⁷ However, the statute itself thwarts this goal by preventing men from transmitting their American citizenship with similar ease.¹⁰⁸ Specifically, § 1409(a)'s burdensome conditions create the possibility of statelessness for children born to unwed American fathers and non-American mothers in countries that prohibit women from transmitting citizenship.¹⁰⁹ Thus, when analyzed in its entirety, § 1409 not only fails to prevent statelessness, but may actually contribute to the problem in certain circumstances.¹¹⁰

105. See *id.* at 8-10 (explaining that Congress made "a legislative judgment that children who have no formal relationship with their United States citizen father are less likely to be raised as Americans," that an unwed father "typically will have no legally recognized parental rights or responsibilities toward his child, and will not be similarly situated to an unwed mother or a married father, unless he takes steps to formalize the paternal relationship," and accordingly "adopted an *additional* requirement that the unwed father put himself in the same legal position as a married father, by legitimating the child or obtaining an adjudication of paternity") (emphasis added).

106. See *id.* at 8 (explaining Congress' decision not to extend the requirements mandated in § 1409(a) to unwed American mothers for fear that their foreign-born children could become stateless if women were held to such rigorous requirements).

107. Cf. REVISION OF IMMIGRATION AND NATIONALITY LAWS, S. REP. NO. 82-1137, at 39 (1952) (noting that the legislative intent behind § 1409(c) was to ensure that foreign-born children of unwed American mothers have a nationality at birth).

108. See *infra* notes 122-123 and accompanying text (describing situations in which § 1409(a)'s conditions on citizen transmission by unwed American fathers may cause children to be born stateless).

109. See *infra* note 122 (listing countries that prohibit maternal citizenship transmission).

110. See Brief of Equality Now, *supra* note 19, at 12 n.8, *Nguyen* (No. 99-2071) (suggesting that § 1409, when operating in conjunction with foreign laws that prohibit maternal citizenship transmission, may effect the statelessness of a child born to an American parent).

c. *The constitutional incompatibility of §§ 1409(a) and (c)*

The underlying problem with § 1409 is that its goals of ensuring a parent-child relationship, on the one hand, and preventing statelessness, on the other, are constitutionally and practically incompatible. Had the Court declared § 1409 unconstitutional, Congress, in order to satisfy constitutional requirements of equal protection, ultimately would have been forced to modify the statute at the expense of one of its goals.¹¹¹ Eliminating the conditions on paternal citizenship transmission, in order to avoid impermissibly burdening one gender, ostensibly would have sacrificed the goal of ensuring a parental relationship between unwed fathers and their foreign-born children.¹¹² Alternatively, attempting to cure the equal protection problem by extending the burdensome conditions to maternal citizenship transmission seemingly would have sacrificed the goal of preventing statelessness.¹¹³

The government's own brief acknowledges this dilemma, conceding that, if forced to equalize the maternal and paternal regulations, the "appropriate course would be to deny unwed mothers their current preference."¹¹⁴ By admitting its ultimate willingness to sacrifice the means by which § 1409 may prevent statelessness, the government casts doubt on the value of that goal and ultimately on the substantiality of the relationship between preventing statelessness and creating gender-based categories to do so.

B. *Ramifications of the Supreme Court's Ruling in Nguyen*

In spite of the Court's attempt to settle the controversy surrounding § 1409, the *Nguyen* decision already has incited extensive criticism from various members of the legal community, both for the immediate ramifications for those individuals directly affected by the

111. See Respondent's Brief at 10, *Nguyen* (No. 99-2071) (explaining that "the remedial question in this case would be whether the terms applicable to unwed fathers and unwed mothers should be equalized by making unwed fathers eligible for the same preference as unwed mothers . . . or whether the Court should strike down Section 1409(a) and (c) entirely or, alternatively, subject unwed citizen mothers to the same requirements as unwed citizen fathers under Section 1409(a)").

112. See *id.* at 33 (explaining that conditions imposed by § 1409(a) upon unwed fathers serve "to ensure that an unwed citizen father whose child is to be made a citizen under Section 1409(a) has attained the same legal relation to the child . . . as both a married citizen father and a married citizen mother have *at birth* . . . or as an unwed citizen mother has *at birth*") (emphasis in original).

113. See *id.* (contending that the government's interest in preventing statelessness is served by exempting unwed American mothers from the requirements mandated in § 1409(a)).

114. *Id.* at 10.

decision, and for the consequences to long-standing efforts to promote gender equality and international human rights.

1. *Direct consequences for Nguyen and others*

The immediate consequences of *Nguyen* are severe for those individuals whose claims of American citizenship hinge on their fathers' ability to transmit their citizenship. Tuan Anh Nguyen, despite having served his full sentence in an American prison, and having spent the majority of his life with his American family in Texas, was ordered deported to Vietnam.¹¹⁵ Ricardo Ahumada-Aguilar and Joseph Lake, the petitioners whose constitutional challenges to § 1409(a) were supported by the Second and Ninth Circuit Courts of Appeals, also will be denied American citizenship.¹¹⁶

2. *Far-reaching national and international consequences*

Nguyen's more profound consequences are the potential effects on the long-standing efforts to eradicate gender-based disparities in legal rights and responsibilities.¹¹⁷ By relying on traditional notions of

115. See, e.g., *On the Docket*, *supra* note 63 (noting that Nguyen had finished serving his felony sentence before the Supreme Court rendered its decision); Joanna L. Grossman, *Supreme Court Ruling a Victory for Motherhood and Sexism*, CNN.COM (June 20, 2001), at <http://www.cnn.com/2001/LAW/06/columns/fl.grossman.ins.06.22/> (noting Nguyen's imminent deportation to Vietnam, and characterizing the country as one with which Nguyen lacks "any meaningful ties" and to which he is "a complete stranger"). But see *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d. 653 (2001) (holding that the INS may not detain an alien indefinitely when there is no realistic chance that the alien will be deported because of, *inter alia*, the absence of a repatriation agreement between the United States and the country to which the alien is to be removed); *The Last of Gender Stereotyping*, *supra* note 31 (explaining that Vietnam has no repatriation agreement with the United States and will not receive Nguyen). Six months after the final order to deport Nguyen, the United States and Vietnam still had not negotiated a repatriation agreement. Telephone Interview with Nancy A. Falgout, Counsel of Record in *Nguyen v. INS*, 533 U.S. 53, 121 S. Ct. 2053 (2001) (July 8, 2002). Thus, to comply with the Supreme Court's decision in *Zadvydas*, the INS released Nguyen from custody. *Id.*; see *Zadvydas*, 121 S. Ct. at 2505 (holding that "an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future").

116. See *Ashcroft v. Lake*, 121 S. Ct. 2518 (2001) (vacating *Lake v. Reno*, 226 F.3d 141 (2d Cir. 2000), and remanding the case to the U.S. Court of Appeals for the Second Circuit for further consideration in light of *Nguyen*); *United States v. Ahumada-Aguilar*, 121 S. Ct. 2518 (2001) (vacating *Ahumada-Aguilar*, 189 F.3d 1121 (9th Cir. 1999) and remanding the case to the U.S. Court of Appeals for the Ninth Circuit for further consideration in light of *Nguyen*).

117. See, e.g., Grossman, *supra* note 115 (arguing that "[r]omantic ideals about the uniqueness of motherhood," which serve as the basis for the gender-based disparities in § 1409 and for the Court's decision to uphold the law, "perpetuate the notion that women, rather than men, should assume responsibility for children"). Grossman further asserts that such ideals "also contribute to negative stereotypes that diminish women as workers, wage earners, and participants in public life . . . and perpetuate . . . a less than ideal concept of fatherhood, in which it is 'natural' for

maternal duties,¹¹⁸ the Court's protection of § 1409 as it stands enables irresponsible fathers, disables responsible fathers, and consigns women to the role of sole parent, regardless of whether women choose this role.¹¹⁹

Nguyen also threatens international efforts to prevent statelessness.¹²⁰ Ironically, despite the government's ostensible goal of supporting such efforts,¹²¹ § 1409 may increase, rather than reduce, the likelihood that children born in certain countries will be stateless.¹²²

More broadly, *Nguyen* stands in conflict with the international trend to treat men and women equally in most aspects of law, including the possession and transmission of citizenship.¹²³ In

fathers to shirk responsibility." *Id.* See also Collins, *supra* note 12, at 1672-73 (arguing that § 1409 creates and perpetuates "a legal regime in which mothers assume *full* responsibility for foreign-born nonmarital children") (emphasis added); cf. Editorial, *Fathers Need Equal Protection*, ST. PETERSBURG TIMES ONLINE (Jan. 18, 2001), at http://www.sptimes.com/News/011801/news_pf/Opinion/Fathers_need_equal_pr.shtml ("If we expect fathers to be as responsible toward their children as mothers, then our laws should reflect that view").

118. See generally Collins, *supra* note 12, at 1672-74, 1682-94 (analyzing the history of coverture, the common law regime that established the rights and responsibilities of parents to children according to marital status and gender, and finding that under coverture, women had exclusive rights and responsibilities regarding children born out of wedlock). As a means to protect men from claims on property and status by illegitimate children, "the law imposed no obligation [on men] to support or care for their nonmarital children." *Id.*

119. See, e.g., *id.* at 1699-1706 (describing § 1409's default allocation of maternal legal responsibility and its protection of male autonomy by hypothesizing the scenario of a United States serviceman who fathers a child abroad, and leaves the mother alone to support herself and the child, while escaping any repercussions for his irresponsibility); *Citizenship and Paternity*, *supra* note 14, at A20 (criticizing § 1409's consequence of burdening fathers who do raise their children); *Supreme Court Upholds Gender-Based Law*, *supra* note 19 (quoting Martha Davis of the NOW Legal Defense and Education Fund for stating that "the Supreme Court's decision protects irresponsible fathers at the expense of Joseph Boulais").

120. Cf. *supra* note 85 and accompanying text (describing international efforts to prevent statelessness).

121. See Respondent's Brief at 11, *Nguyen* (No. 99-2071) (describing the government's objective of using § 1409 to prevent statelessness).

122. See Mariner, *supra* note 14, at 4 (citing Algeria, Kuwait, and Nepal as countries in which women are constitutionally prohibited from transmitting their citizenship to a child and concluding that a child born in one of the countries to an American father and a woman citizen of the country "must take his father's citizenship, or be stateless"); Brief of Equality Now, *supra* note 19, at 12 nn.8-9 (citing Initial Report of States Parties due in 1997: Kuwait, CCPR/C120/Add.1 (1999), at 300-301, which notes that Kuwaiti law exclusively permits paternal citizenship transmission, and suggesting that "it is possible that 8 U.S.C. § 1409, operating in conjunction with laws in other countries that deny women the right to transmit citizenship, could result in the statelessness of a child born out-of-wedlock and abroad").

123. See Brief of Equality Now, *supra* note 19, at 2-3 (citing Supreme Court precedent for looking to international legal norms when deciding cases in the context of immigration law; urging the Court to consider "the growing international as well as national recognition that . . . distinctions between fathers and mothers are

particular, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which the United States signed in 1980, but has yet to ratify, states in its Preamble, “the role of women in procreation should not be a basis for discrimination” and “the upbringing of children requires a sharing of responsibility between men and women.”¹²⁴

III. RECOMMENDATIONS: AMENDING THE STATUTE

This Comment seeks to draw attention to the legal dilemmas inherent in § 1409 and the Supreme Court’s analysis of its constitutionality. These dilemmas include the statute’s discriminatory nature,¹²⁵ the Court’s failure to scrutinize such discrimination properly,¹²⁶ and most fundamentally, the statute’s inability to promote fully either of its stated objectives.¹²⁷ Although *stare decisis* renders a proper judicial resolution of these dilemmas

incompatible with the equal sharing of parental responsibility and serve to entrench stereotypes that absolve men of this responsibility”). The Equality Now Amicus Brief also cites the United States’ own report to the United Nations Human Rights Committee, in which the United States reported that “[i]t is virtually certain that the Supreme Court would strike down any significant distinction between men and women in the enjoyment of the civil and political rights secured by the [International Covenant on Civil and Political Rights], either under the substantive right involved or as a matter of equal protection.” *Id.* at 7 (citing Initial Reports of States Parties due in 1993: United States of America, CCPR/C/81/Add.4 (1994) at 105). The Brief explains that the United Nations Human Rights Committee has expressed concern, in the context of potential statelessness of children, about laws “that treat mothers and fathers differently in the transmission of citizenship to children.” *See id.* at 11. The Brief further cites the preamble of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which proclaims that “the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women . . .” and that “a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.” *See id.* at 12-13. The United States has signed, but has not ratified CEDAW. *See id.* at 17. The Equality Now Brief argues, however, that the “broad” and “overwhelming” ratification of CEDAW throughout the world, and its reflection of general principles of customary international law render it an important legal source, which the Supreme Court should have considered in *Nguyen*. *See id.* at 17-18. *See also* MacKinnon, *supra* note 98, at A15 (recommending that the U.S. Congress should follow the international trend to modify domestic citizenship requirements that discriminate on the basis of gender to meet international equality standards).

124. United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, preamble, 1249 U.N.T.S. 14.

125. *See generally supra* Part I.A (contrasting § 1409(a)’s burdensome requirements for citizenship transmission by unwed fathers with § 1409(c)’s simple requirements for citizenship transmission by unwed mothers).

126. *See generally supra* Part II.A.2-3 (examining the Supreme Court’s equal protection analysis in *Nguyen*).

127. *See supra* Part II.A.3.a-b (arguing that § 1409’s provisions may defeat the very objectives that the statute was intended to promote).

unlikely,¹²⁸ Congress, by amending the statute, may better address its objectives and remove the taint of discrimination from the law.

A. Ensuring a Parental Relationship Between Unwed Parents and Children Born Abroad

As indicated by the government and acknowledged by the Court, § 1409's primary objective is to ensure the existence of authentic parental relationships as a condition for conferring citizenship to children born overseas and out of wedlock.¹²⁹ Nevertheless, the statute's current provisions do not fulfill this goal.¹³⁰ If Congress sincerely is interested in ensuring a substantive relationship between unwed parents and their foreign-born children, it should redraft the statute to impose conditions that actually address such a relationship.¹³¹ Moreover, Congress ought to acknowledge that childbirth does not necessarily result in a substantive relationship between mother and child¹³² and accordingly, should require unwed mothers to establish the existence of a tangible maternal relationship with their foreign-born children as well.

A logical solution would be to amend § 1409(a)(1) to require that "a blood [and substantial parental] relationship between the [foreign-born child] and the [American citizen parent] is established by clear and convincing evidence."¹³³ By expanding this provision to

128. See, e.g., *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (noting the Court's reluctance to depart from its own precedent, particularly when "the legislative power is implicated, and Congress remains free to alter what we have done").

129. See Respondent's Brief at 10, *Nguyen* (99-2071) (explaining that if forced to choose between § 1409's relationship-ensuring and statelessness-preventing provisions, the government would opt to maintain the former); see also *Nguyen*, 121 S. Ct. at 2060-61 (citing as the government's important interests, the assurance of a biological parent-child relationship and the assurance of a demonstrated opportunity for a substantive connection between the citizen parent and foreign-born child).

130. See *supra* Part II.A.3.a-b (contending that § 1409 fails to recognize some legitimate paternal bonds, as demonstrated by *Nguyen*, and universally presumes the existence of maternal bonds by virtue of birth, even where the mother-child connection does not endure).

131. See generally 8 U.S.C. § 1409 (1994) (evaluating a paternal bond between unwed fathers and foreign-born children by the father's biological, financial, and legal connection to the child, and evaluating a maternal bond between unwed mothers and foreign-born children exclusively by the existence of a biological connection); see also *supra* Part II.A.3.a-b (discussing § 1409's failure to ensure parent-child relationships in situations where fathers, like Joseph Boulais, enjoy a genuine bond with their child but fail to make that bond official under the law, and noting the statute's wrongful assumption of a parent-child relationship where mothers give birth to a child, but fail otherwise to maintain a maternal bond).

132. See *supra* note 92 (discussing circumstances in which childbirth does not result in an enduring, substantive relationship between mother and child).

133. See 8 U.S.C. § 1409(a)(1) (requiring, at present, that "a blood relationship between the person and the father is established by clear and convincing evidence").

require evidence of a substantial relationship and extending the requirement to mothers as well, the statute would go much further to ensure the existence of the “real, everyday ties,” which the Court in *Nguyen* held to be important.¹³⁴ Moreover, the statute’s additional requirements that unwed fathers legitimate their paternity, agree in writing to provide financial support, and do both before the child turns eighteen¹³⁵ would no longer be necessary. Courts could consider such factors, among others, in evaluating whether there is clear and convincing evidence of a substantial parental relationship.¹³⁶ In brief, amending § 1409 so that it simply requires clear and convincing evidence of a biological and substantial parental relationship between unwed parents and their foreign-born children would advance both of the Court-interpreted government interests¹³⁷ and would remove the taint of discrimination from the statute.

B. Preventing Statelessness

Eliminating § 1409’s paternal legitimation and support requirements, as well as its eighteen-year limitation period, and replacing these requirements with a broader “clear and convincing evidence of a substantial parental relationship” standard could also enhance the statute’s ability to prevent statelessness.¹³⁸ By allowing flexibility in the evaluation of what constitutes a substantial parental relationship, the statute would facilitate citizenship transmission by fathers like Joseph Boulais, who enjoy meaningful relationships with

The proposed amendment to this statute borrows from family law standards of evaluating a paternal relationship. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 142-43 (1989) (Brennan, Marshall, and Blackmun, JJ., dissenting) (holding that an unwed father’s biological link and “substantial parent-child relationship” with a child guarantee that father a constitutional stake in his paternal relationship; elaborating that a substantial relationship may be evidenced by a demonstrated “full commitment to the responsibilities of parenthood” such as participation in the child’s upbringing) (citing *Stanley v. Illinois*, 405 U.S. 645 (1972), *Quilloin v. Walcott*, 434 U.S. 246 (1978), *Caban v. Mohammed*, 441 U.S. 380 (1979) and *Lehr v. Robertson*, 463 U.S. 248 (1983)).

134. See *Nguyen*, 121 S. Ct. at 2060-61 (citing the government’s important interest in ensuring a demonstrated opportunity for a substantive connection between the citizen parent and foreign-born child).

135. 8 U.S.C. §§ 1409 (a)(3)-(4).

136. See *Michael H.*, 491 U.S. at 142-43 (Brennan, Marshall, and Blackmun, JJ., dissenting) (evaluating the substantiality of a parent-child relationship between an unwed father and his biological child by considering the father’s dedication to the responsibilities of parenthood, including participation in the child’s upbringing).

137. See *Nguyen*, 121 S. Ct. at 2060-61 (inferring the governmental interests of ensuring a biological parent-child relationship and the demonstrated opportunity for the development of a genuine, substantive connection between citizen parent and child).

138. See *supra* note 56 and accompanying text (identifying the prevention of statelessness as one of the two purposes of § 1409).

their foreign-born children, but fail to fulfill the statute's current technical requirements.¹³⁹ Moreover, in instances where such fathers conceive children with non-American mothers in countries that prohibit maternal citizenship transmission, the proposed changes to § 1409 would prevent statelessness instead of causing it, as the statute's current provisions do in such circumstances.¹⁴⁰

Conversely, extending the proposed "clear and convincing evidence of a substantial parental relationship" standard to unwed mothers might fail to prevent statelessness in situations where unwed American mothers cannot demonstrate a meaningful relationship with their foreign-born child.¹⁴¹ However, in light of the Supreme Court's apparent willingness to accept childbirth as a strong indication of the "real, everyday ties" that constitute legitimate parent-child relationships,¹⁴² this consequence seems relatively minimal. Moreover, to the extent that the proposed amendment to § 1409 would not fully realize the government's objective of preventing statelessness, it must be remembered that this flaw already exists in the current version of the statute.¹⁴³ Additionally, the government conceded its ultimate willingness to forego its statelessness objective altogether.¹⁴⁴ The proposed amended version of § 1409 thus would improve upon the present statute by more effectively ensuring the existence of parent-child relationships when conferring citizenship, and by preventing statelessness in most of the circumstances currently addressed by the statute, as well as in other circumstances, which the statute currently neglects.¹⁴⁵

Finally, beyond the limited context of the statute itself, the United States also could promote its concern for stateless children internationally by signing and ratifying one or both of the United

139. See *supra* notes 61, 63-64, 82 and accompanying text (describing the substantive relationship between Nguyen and his father).

140. See Brief of Equality Now at 12 n.8-9, *Nguyen* (99-2071) (noting that § 1409 may cause statelessness of children born to unwed American fathers and non-American mothers in countries whose laws prohibit maternal citizenship transmission).

141. See *supra* note 92 (noting the reality that some mothers do not maintain enduring relationships with their child after birth).

142. See *Nguyen*, 121 S. Ct. at 2061 (finding that proof of a maternal relationship is "inherent in birth itself").

143. See *supra* notes 122-123 (explaining how § 1409(a) may function to cause statelessness).

144. See Respondent's Brief at 10, *Nguyen* (99-2071) (admitting the government's ultimate willingness to deny unwed mothers "their current preference," and thus sacrifice the means by which § 1409 currently functions to prevent statelessness).

145. See *supra* note 87 and accompanying text (suggesting that the United States has overlooked § 1409's facilitation of statelessness among children born to unwed American fathers and non-American mothers in countries that prohibit women from transmitting their citizenship).

Nations conventions addressing statelessness.¹⁴⁶

C. Promoting Gender Equality

In addition to highlighting the inadequacies of § 1409's current provisions, the legal community can emphasize the statute's legislation by default of unequal parental responsibility between mothers and fathers.¹⁴⁷ Whereas the statute facilitates maternal citizenship transmission to children born abroad and out of wedlock, rendering mothers automatically responsible for such children, it impedes paternal citizenship transmission by enabling fathers to avoid parental responsibility if they so choose.¹⁴⁸ Public emphasis on § 1409's imposition of different degrees of parental responsibility on women and men may generate a better understanding of the statute's discriminatory nature and, perhaps, encourage Congress to redraft the law.¹⁴⁹

CONCLUSION

The Supreme Court, in *Nguyen*, sought to settle a legal controversy that had encompassed scholars, legislators, practitioners, and federal judges. In holding § 1409 constitutional, the Court attempted to resolve the complex debate over whether its own standards of equal protection require federal laws to treat mothers and fathers equally in their roles as parents. However, the Court's superficial application of its self-formulated heightened scrutiny test has rendered its decision hollow. As Justice O'Connor asserted in her dissent:

The Court recites the governing substantive standard for heightened scrutiny of sex-based classifications . . . but departs from the guidance of our precedents concerning such classifications . . . [T]he majority hypothesizes about the interests served by the statute and fails adequately to inquire into the actual purposes of § 1409(a)(4). The Court also does not always explain

146. See, e.g., United Nations Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117 (asserting the international goal of regulating and improving the status of stateless persons); Convention on the Reduction of Statelessness, Aug. 30, 1961, 1081 U.N.T.S. 283 (declaring the international goal of reducing statelessness).

147. See Collins, *supra* note 12, at 1706 (urging a reevaluation of the current application of equal protection analysis to citizenship laws, which purport to legislate legal rights, but which, by default, also legislates legal responsibilities).

148. See *supra* notes 117, 119 and accompanying text (discussing the contradictory consequences of § 1409 for men and women).

149. See Collins, *supra* note 12, at 1707 (suggesting that an unawareness of § 1409's "default rules of parental responsibility" lead both legislatures and courts to compromise gender equality in an effort to fulfill "ostensibly rational policy interests").

adequately the importance of the interests that it claims to be served by the provision. The majority also . . . casually dismisses the relevance of available sex-neutral alternatives [to § 1409(a)] . . .

[I]n all, the majority opinion represents far less than the rigorous application of heightened scrutiny that our precedents require.¹⁵⁰

In upholding § 1409, the *Nguyen* Court ignored the statute's failure to recognize authentic parental relationships, such as the bond between Nguyen and his father. The *Nguyen* Court also ignored the statute's tendency to cause statelessness, rather than prevent it, in circumstances where a child is born to an unwed American father and non-American mother in a country that prohibits women from transmitting their citizenship to their children. Finally, rather than upholding the Constitution's guarantees of equal protection, the *Nguyen* decision may serve to legalize long-standing stereotypes of men's and women's parental roles, obliging women to accept maternity at conception, but enabling men to deny their paternity indefinitely.

150. *Nguyen v. INS*, 121 S. Ct. 2053, 2069 (2001) (O'Connor, Souter, Ginsburg, and Breyer, JJ., dissenting).